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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN CORDELL BELCHER, Defendant and Appellant.	E041148 (Super.Ct.No. RIF125411) **OPINION**

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part.

Christine Vento, under appointment by the Court of Appeal, and Richard M. Leary for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Justin Cordell Belcher physically and emotionally abused his girlfriend, Jamie A. She was constantly suspicious that he was cheating on her. In July 2005, he admitted that he had another girlfriend, and they broke up.

About a week later, defendant asked Jamie to get into his car so they could talk. They started arguing. He slapped her in the face, giving her a split lip, then forced her to orally copulate him and to have sexual intercourse with him. He also took $80 from her purse. She reported this to the police.

After a couple of weeks, Jamie reconciled with defendant; then she broke up with him again. In an apparent effort to make contact with her, defendant tailgated her car. He swerved to the left and to the right of it, as if to force her off the road. A witness called 911; Jamie reported the incident to the police, and defendant was arrested.

Nevertheless, Jamie reconciled with defendant yet again. At his urging, she wrote letters and made phone calls recanting her statements to the police. She also lied at the preliminary hearing. About three weeks before trial, however, defendant admitted to Jamie that he had been cheating on her for a year with a girl who was his fiancée. Jamie immediately contacted the prosecutor and agreed to testify against defendant.

A jury found defendant guilty as follows:

Count 1: Forcible rape (Pen. Code, § 261, subd. (a)(2)).

Count 2: Forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)).

Count 3: Second degree robbery (Pen. Code, § 211).

Count 4: Spousal abuse (Pen. Code, § 273.5, subd. (a)).

Count 5: Felony false imprisonment (Pen. Code, §§ 236, 237, subd. (a)).

Count 7: Assault with a deadly weapon and/or by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)).

On count 6, which charged stalking (Pen. Code, § 646.9, subd. (a)), the trial court granted defendant's motion for acquittal. (Pen. Code, § 1118.1.)

Defendant was sentenced to a total of 43 years in prison. This included a one-year prior prison term enhancement. (Pen. Code, § 667.5, subd. (b).) It also included the use of defendant's prior federal conviction for attempted bank robbery as a "strike." (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.)

Defendant now contends:

1. The trial court erred by excluding certain letters and phone conversations between the victim and defendant for any purpose other than to impeach the victim.

2. The prosecutor failed to produce recordings of three additional phone conversations between the victim and defendant, in violation of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].

3. There was insufficient evidence that defendant's prior federal conviction for attempted bank robbery constituted a strike.

4. At sentencing, the trial court erred by refusing to relieve defendant's retained counsel and to provide appointed counsel.

5. The trial court erred by having defendant removed from the courtroom before sentencing him.

6. The trial court erred by failing to make any finding on the one-year prior prison term enhancement allegation. (Pen. Code, § 667.5, subd. (b).)

7. The trial court erred by failing to state reasons for imposing full consecutive sentences on count 1 (forcible rape) and count 2 (forcible oral copulation).

8. Once the trial court had sentenced defendant on count 1 (forcible rape), count 2 (forcible oral copulation), and count 3 (robbery), the imposition of separate and unstayed sentences on count 4 (spousal abuse) and count 5 (false imprisonment) constituted multiple punishment in violation of Penal Code section 654.

9. The trial court made a prohibited dual use of defendant's prior conviction as both an aggravating factor and as the basis of a prior prison term enhancement.

10. The trial court erred by imposing upper-term sentences and consecutive sentences based on factual findings not made by a jury and not made beyond a reasonable doubt.

We find no prejudicial error affecting the verdicts of guilt. The People concede, however, that there was insufficient evidence that defendant's prior conviction constituted a strike. They further concede that the trial court erred (1) by making a prohibited dual use, and (2) by violating Penal Code section 654. These conceded errors require us to reverse as to the sentence and remand. Defendant's other contentions relating to sentencing are therefore moot. Although we will discuss some of them for the guidance of the trial court on remand, we find no other error.

I

FACTUAL BACKGROUND

A. *July 23, 2005: Counts 1-5.*

As of July 2005, defendant and his girlfriend Jamie A. had been a couple for about two years. Defendant had been "physically violent" with Jamie about five or six times. He had also threatened her verbally.

On several occasions, defendant made Jamie get in his car, saying that he wanted to talk to her; he then drove her to a remote area and used threats to make her take her clothes off. She testified: "I would have to put my hands above my head . . . [and] put one leg out the window. And he'd ask me if I felt stupid. Did I feel open?" She admitted that afterwards, they would have consensual sex. She also admitted that, during their relationship, they sometimes had consensual "rough sex," but it did not involve hitting or choking.

Defendant got "[a] lot of phone calls late at night." One particular time, when he got a text message, at first he said it was from his girlfriend, but then he said he had been lying to make Jamie jealous. They had many fights about whether he was cheating, but she never had proof.

In July 2005, Jamie was present when defendant got a call from a number identified on his cell phone as "my heart." He finally admitted that he had another girlfriend. As a result, they broke up.

About a week later, on July 23, 2005, defendant called Jamie and said, "I really want to talk." She told him that she had to go to a doctor's appointment, but they could talk there.

When they met at the doctor's office, defendant said, "Let's talk in [my] car." From past experience, Jamie believed that, if she got into his car, he would not let her go until he had "talk[ed] to [her] for hours on end . . . ." He assured her, however, that he would only talk to her for a few minutes, because he had "somewhere else to go." Thus, when she got into his car, she did so voluntarily.

Defendant drove to a nearby alley and parked. They started arguing. Defendant asked Jamie if she had met anyone else. She said yes, two other people. He ordered her to phone them and say that "[she] was working it out with [her] boyfriend. They were not to call [her] anymore." When she refused, defendant "karate chopped" her twice in the neck. She then complied, because she was "scared." By this point, she did not feel free to leave.

As they continued to argue, defendant strangled her, pulled her hair, and slapped her in the mouth. Her lips were split and bleeding. Defendant threatened to beat her up and to kill her.

Defendant told Jamie to undress. Because of his threats, she complied. He then held a small, sharp object, "[l]ike a nail or maybe a screwdriver," to the back of her neck and told her "to give him head." She said, "I can't do it. . . . My lips hurt." He replied,

"You better or I'll kill you. I'll shove this . . . in the back [of your neck]." She therefore complied.

Defendant ordered her to get on top of him and have sexual intercourse with him. Once again, she complied. After he ejaculated, he said, "Do you feel stupid?" He then grabbed her purse, took out $80, and put the money in his pocket.

They remained in the alley, arguing, for about an hour. Defendant then drove Jamie back to her car and said, "[D]on't call the police." Jamie told her sister what had happened. She begged her sister not to call the police because she was afraid of defendant, but her sister did so anyway.

Jamie's statements to the police were essentially consistent with her trial testimony. The police observed a cut lip and bruises on her neck. Photographs of Jamie's "busted lips" and of red marks on her neck were shown to the jury.

Jamie was given a sexual assault examination. Her statements to the sexual assault nurse were largely consistent with her trial testimony. The nurse saw two lacerations on her mouth. Defendant's semen was found in Jamie's vagina. She had no injuries to her reproductive tract. However, the nurse explained that such injuries are found in "[l]ess than 20 percent" of rapes.

B. *August 9, 2005: Count 7.*

Over the next couple of weeks, Jamie was angry with defendant. However, she still loved him, so she got back together with him. One day, defendant got a phone call

that Jamie believed was from "some girl." As a result, she broke up with him again. He kept phoning her, but she would not answer.

On August 9, 2005, around 6:30 p.m., Jamie was driving home from work on Reche Canyon Road when she passed defendant, going in the opposite direction. He made a U-turn, then passed two other cars and started tailgating her. She speeded up to the car ahead of her. The driver of that car, Jacquelyn Gray, corroborated Jamie's account of subsequent events.

All three cars were tailgating each other, going about 50 miles an hour. There was only one lane in either direction. Defendant tried to pull up alongside Jamie's car, first on the driver's side, forcing her toward the side of the road, and then on the passenger side, forcing her toward the oncoming lane. She saw him mouth the words, "[P]ull over." After that, he fell back in behind her, but he continued to tailgate her. Gray called 911.

At an intersection, all three cars stopped for a red light (or possibly a stop sign). Jamie pulled up next to Gray. Gray asked her, "Do you know this person?" She answered, "Yes. I've been asking him not to bother me anymore." Gray said, "[M]ake a right turn in front of me and I'll try to keep you guys separated." Jamie complied. At a traffic signal, however, Jamie went through, just at the end of the yellow or the beginning of the red; Gray stopped for the red light, but defendant went on through behind Jamie.

At this point, the road had two lanes in each direction. Defendant pulled up alongside Jamie. They continued to drive while having "a full-blown argument." Gray

followed them into a mall parking lot. Jamie parked but stayed in her car; defendant walked over and continued arguing with her.

When the police arrived, Jamie was agitated and upset. Her statement to them was essentially consistent with her trial testimony. However, she admitted telling them falsely that she had not had sex with defendant for six months.

Defendant was arrested. He told police, referring to Gray, "That [bitch] should mind her own business." Jamie asked the police not to arrest him, saying that he had not been trying to run her off the road and that the incident had not been that serious. She also said "she didn't know what he would do to her if he went to jail because of her."

C. *Events Leading up to Trial.*

By August 14, defendant was out of jail. He phoned Jamie and said "he was sending somebody to whip [her] ass." He and "some girl" came to Jamie's house; he stayed out in the street, while the girl came up to Jamie's door. Jamie did not open the door.

On August 18, Jamie got a restraining order against defendant. Around the end of September, however, they got back together yet again.

On October 5, defendant was rearrested. Jamie admitted that while defendant was in jail she wrote to him every day, spoke to him on the phone, and visited him as often as the jail allowed. She also "put money on his books."

Defendant "put [a] guilt trip on [her]." He urged her to tell "the DA . . . this didn't happen." He told her to write letters to him saying that he had not raped her so that he

could give them to his attorney to use in court. He also told her to lie in their phone calls, which were recorded. He communicated this in code, or by mouthing it. They also discussed it in phone calls made under another inmate's personal identification number. Jamie complied. She wrote at least two exculpatory letters. She also said in phone calls to defendant that he had not raped her. She told both prosecution and defense investigators that the rape never happened.

Jamie admitted that, at the preliminary hearing, she "lied the whole time." For example, she testified that, in the first incident, she cut her own lips by accidentally hitting herself in the face during a struggle over her cell phone. She also testified that, in the second incident, she and defendant were "playing car games[.]"

In October 2005, Jamie had seen defendant with a girl and a distinctive car. Defendant had explained that the girl was his cousin Naomi, and the car belonged to her. In February 2006, Jamie saw "a guy" driving the same car. She asked him if it was his car; he said it belonged to his girlfriend Julia.

About a week later, on February 15, 2006, defendant admitted that Julia was his fiancée[1] and that he had been cheating on Jamie for a year. Jamie felt "[h]urt," "angry," "manipulated" and "set up." She said, " . . . I'm not going to lie for you anymore. . . . I'm telling the DA." On February 17, 2006, she told the prosecutor that she had changed her mind and wanted to go forward with the prosecution against defendant.

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[1] Apparently Julia was also the girl who had previously come up to Jamie's door.

At trial, Jamie testified that she still cared for defendant and did not want to see him go to prison for a long time.

Detective Bruce Bell, an expert on domestic violence, testified that it is common for a domestic violence victim not to call the police. At preliminary hearings, 80 to 90 percent of domestic violence victims "either minimize or falsely represent what originally occurred." Domestic violence victims often stay with the perpetrator. They blame themselves for the abuse, and they convince themselves that it won't happen again. He conceded, however, that in perhaps "one out of a hundred cases," domestic violence reports are fabricated and that jealousy could be one reason for fabricating a report.

II

THE EXCLUSION OF JAMIE'S EXCULPATORY LETTERS AND PHONE CALLS TO DEFENDANT

Defendant contends that the trial court erred by excluding certain letters by and phone conversations with Jamie, except for the purpose of impeaching Jamie. Alternatively, in the event that we hold that his trial counsel forfeited this contention, he contends that his trial counsel rendered ineffective assistance.

A. *Additional Factual and Procedural Background.*

During the prosecution's case-in-chief, Jamie testified that she wrote letters to defendant while he was in jail in which she falsely stated that he had not raped her. She explained that defendant had asked her to do so, so that he could use the letters in court.

After the prosecution rested, defense counsel filed a written motion in limine to admit letters from, and phone calls with, Jamie. The motion did not identify the particular letters or phone calls involved and did not specify their contents. Defendant now asserts that the letters and phone calls were the ones that his defense counsel had previously had marked as exhibits B through Q and U through Z. As the People appear to concur, we accept this assertion.[2]

The bulk of the letters were written while defendant was in jail but before the preliminary hearing. One, however, is undated, and one was written a week after the preliminary hearing. In the letters, Jamie repeatedly expressed her love for defendant and her desire to get back together with him. In addition, in two of them, she made statements that contradicted her trial testimony. She stated, "For the record[,] I would like to say you never raped me[;] I did stretch the truth on that one because I felt you cheated and lied to me. We had already made up in the car before we had sex . . . ." She also stated, "I also told them that you took my money and felt stupid when I later found it in my purse . . . ."

The phone calls took place in the week after the preliminary hearing. In them, Jamie repeatedly opined that the authorities should have known that she was lying. For example, she stated: "I'm sitting up there lying in his face. Here I am supposedly irate but I have no expression on my face. Shouldn't I be crying and bawling . . . [?]" She also

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[2] It is not clear whether the trial court knew that the motion involved the previously marked exhibits or, even if so, whether it was aware of the contents of those exhibits. Nevertheless, we will assume, without deciding, that defendant made an adequate offer of proof. (See Evid. Code, § 354, subd. (a).)

stated: "[W]hat gets me is how I filed all these false police reports . . . in the past . . . but just now ya'll believe in me . . . ?"

The prosecutor objected on hearsay grounds. Defense counsel argued that the letters and calls were within the hearsay exceptions for (1) declarations against interest (Evid. Code, § 1230), (2) statements by a coconspirator (Evid. Code, § 1223), (3) contemporaneous statements (Evid. Code, § 1241), and (4) prior inconsistent (Evid. Code, § 1235) or prior consistent statements (Evid. Code, § 1236).

The trial court ruled: "The prior consistent and the prior inconsistent statement[s] in . . . those documents or the tape recordings[,] I would allow you to use that to cross-examine her with, but they're not coming in as evidence."

Ultimately, defense counsel did *not* examine Jamie regarding the letters or the phone calls.[3] Rather, on redirect, the *prosecutor* brought out the fact that defendant had asked her to lie, not only in letters, but also in phone calls.

B. *Analysis.*

Defendant now argues that the letters were admissible under the state of mind exception (Evid. Code, § 1250) to show "the depth and intensity" of Jamie's love for defendant and therefore to suggest that, once she learned that he was cheating on her, she was likely to accuse him falsely.

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[3] He did ask her one question about one statement in the phone calls; however, the prosecution objected to the question as leading and irrelevant, and the trial court sustained the objection. Defendant does not claim this was error.

Defense counsel forfeited this contention by failing to rely on this particular hearsay exception below. (*People v. Dixon* (2007) 153 Cal.App.4th 985, 997.) Defendant argues, however, that this failure amounted to ineffective assistance of counsel. We therefore review it under this rubric.

"'"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]"' [Citation.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 170.)

We may assume, without deciding, that defense counsel's failure to rely on the state of mind exception fell below an objective standard of reasonableness. Even if so, no

prejudice is apparent. As evidence that Jamie was deeply and passionately in love with defendant, the letters were cumulative. Considering how much she put up with and for how long, she was clearly involved in an *amour fou*. Admittedly, as defendant argues, the letters did illustrate the depth of her feelings. For example, she told defendant that she wore one of his shirts every day; she added, "I'm . . . just sick to my stomach because you can't be here with me." Still, everybody knows what it means to be in love, and nothing in the letters went beyond the commonplace expressions of this feeling.

Moreover, the fact that Jamie was passionately in love with defendant during this period cut both ways — it suggested that her testimony in his *favor* at the *preliminary hearing* was false. Arguably, it also suggested that, after learning that he had cheated on her, she might accuse him falsely, but it was weak evidence of this, at best. She had reported both the July 23 and August 9 offenses immediately after they occurred, at a time when she had no apparent reason to accuse him falsely; indeed, she had reported them only reluctantly (further evidence of her love for defendant). In any event, she testified that defendant's admission that he had cheated on her caused her to contact the prosecutor and to agree to testify against defendant. She also testified that she was hurt and angry.

Defendant also argues that the letters would have impeached Jamie. He claims that, although she testified that her letters were part of a scheme to exculpate defendant, the letters themselves would have belied this, because only two of them actually contained exculpatory statements. The trial court, however, *allowed* defense counsel to use the letters for impeachment. In any event, Jamie never testified that *all* of her letters

were part of this scheme; to the contrary, she had specifically testified that she wrote only two letters saying that defendant had not raped her. Thus, the letters would not have impeached her in this respect.

We therefore see no reasonable probability that, if the letters had been admitted, defendant would have enjoyed a more favorable outcome.

Unlike the letters, the phone calls did not contain much in the way of expressions of love. Defendant nevertheless argues that they should have been admitted under the state of mind exception, because Jamie "comes across on the recordings as truthful." In other words, if the jurors had been able to hear her voice (or at least to read her words in the transcripts), they would have found that she was telling the truth in the phone calls and, hence, that she was lying at trial.

The statements in the phone calls, however, were not statements "of the declarant's then existing state of mind, emotion, or physical sensation . . . ." (Evid. Code, § 1250, subd. (a).) They were statements of a supposed past fact — that Jamie had been lying. Even under the state of mind exception, a statement of memory or belief is not admissible to prove the fact remembered or believed. (*Id.*, subd. (b).) The fact that she made these statements passionately, vehemently, or otherwise credibly would be *direct* evidence of truthfulness, not hearsay evidence of a truthful state of mind. In short, defendant wanted to introduce Jamie's out-of-court statements in the hope that the jury would believe them, in preference to her in-court testimony. But this is simply not how the state of mind exception works.

This argument founders for the additional reason that the trial court *allowed* defense counsel to use the phone calls to impeach Jamie. For example, in one phone call, Jamie said, "I done did enough. Did enough damage. . . . I stood up here and got you in jail for me lying. And that's just really taking a toll on my soul and my conscience and just everything." Defense counsel was free to read these words out loud to Jamie and to ask her if she made this statement. We are at a loss to identify any statements in the transcripts that defendant is claiming should have come in under the state of mind exception that could not have come in as impeachment.

The audio recordings of the phone calls — as opposed to the transcripts — were never offered into evidence; they are not in the record. Accordingly, defendant cannot show that, if they had been admitted, he would have enjoyed a more favorable result. "Whether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition. [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 711.)

In sum, we conclude that defendant cannot show that the asserted ineffective assistance of counsel was prejudicial.

III

FAILURE TO PRODUCE JAILHOUSE RECORDINGS

OF PHONE CALLS BETWEEN DEFENDANT AND JAMIE

Defendant contends that the prosecutor failed to produce recordings of three phone calls between him and Jamie, in violation of his constitutional rights under *Brady v. Maryland*, *supra*, 373 U.S. 83.

A. *Additional Factual and Procedural Background.*

After both sides had rested, but before jury instructions and closing argument, the prosecutor informed defense counsel and the court that she had just received a recording of "an additional jail call" that took place on February 15, 2006.

The prosecutor explained: "There are two calls between the defendant and the victim where they're arguing about him having another girlfriend, Julie or Julia, and the victim tells him 'I'm not going to lie for you. I'm going to call [the prosecutor].' And at one point in the conversation she said, 'I hope you spend the rest of your life in jail' and hangs up on him."

The trial court ordered a recess so that defense counsel could listen to the recordings. After the recess, defense counsel moved for a mistrial:

"THE COURT: [¶] . . . [¶] Did you listen to the tape?

"[DEFENSE COUNSEL]: I did, Your Honor.

"THE COURT: Any comment?

"[DEFENSE COUNSEL]: Yes. This — this [is] actually two tapes,[4] but these were on the day of . . . February 15th. [¶] . . . [¶] . . . And it's been an issue with my client from the very beginning that [February 15, 2006,] was the point in which the [victim] began to fabricate and had motive to do so. I feel that there is nothing remedial at this point I can do as far as using them for impeachment of the victim and, therefore, would more for a mistrial.

"THE COURT: Say that over again.

"[DEFENSE COUNSEL]: . . . I think those are [a] critical part of our defense relative to impeaching the [victim].

"THE COURT: Tell me why.

"[DEFENSE COUNSEL]: Well, it goes to her last conversation with [defendant] and her decision then to prosecute and —

"THE COURT: Okay.

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4 Actually, there were three calls. However, they all took place between 12:51 and 1:16 p.m., and they are best viewed as a single conversation, with two interruptions.

Defendant claims that "the prosecution never revealed to trial counsel the existence of [the first] conversation . . . ." In support of this claim, he notes that the prosecutor and defense counsel both referred to two calls. He further notes that the only content of the calls that either side referenced in the ensuing argument came from the second and third calls.

This conclusion is highly speculative. Defense counsel may have listened to the first call but agreed that only the second and third calls were significant. Alternatively, he may simply have misspoken, following the prosecutor's lead. Because we have no way of knowing what happened during the recess, this claim should be raised, if at all, by way of a habeas petition.

"[PROSECUTOR]: And her motivation for doing so.

"THE COURT: She already told us what her motivation was, because he had another girlfriend. I mean, she made that clear."

The trial court denied the motion for a mistrial.

B. *Analysis.*

"The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. [Citations.] 'Evidence is "favorable" if it . . . helps the defense or hurts the prosecution, as by impeaching one of [the prosecution's] witnesses.' [Citation.] 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different."' [Citations.] Such a probability exists when the undisclosed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Citations.]" (*In re Miranda* (2008) 43 Cal.4th 541, 575.) On appeal, "a *Brady* claim [citation] [is] subject to independent review. [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

Certainly the recordings were favorable to the accused. They tended to impeach Jamie by showing that she had decided to help the prosecution and to testify against defendant because he finally admitted that he had been cheating on her.

The People do not argue that the recordings would have been inadmissible. At a minimum, some portions would have been admissible for the nonhearsay purpose of

showing that, on February 15, 2006, defendant told Jamie that he had had another girlfriend. Moreover, Jamie's statement, "I'm not going to lie for you. I'm going to call [the prosecutor]," would be admissible under the contemporaneous statement exception to the hearsay rule. (Evid. Code, § 1241.) The fact that she hung up immediately after that would also be admissible. Thus, while the People do not concede that the recordings were material, they do concede that they "qualifie[d as *Brady* material in the sense [that they were] favorable to appellant" and hence that they "could be construed to have been constructively suppressed."

The prosecution, however, *did* disclose the recordings, albeit belatedly. Under these circumstances, the question is whether the *delay* was material. (See *People v. Cook* (2006) 39 Cal.4th 566, 590.) The problem with defendant's contention is that defense counsel could still have moved to reopen.[5] He chose instead to ask for a mistrial. In light of the option of reopening, however, defendant can hardly argue that he had been prejudiced. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029 ["[a] motion for mistrial should be granted only when a party's chances of receiving a fair trial have been irreparably damaged"].) The delay itself did not prejudice defendant.

We cannot say that a motion to reopen would have been futile, even though the trial court did deny the motion for a mistrial. The jury had not yet been instructed;

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[5] Even assuming Jamie's statements were not admissible unless she was given an opportunity to explain or deny them (see Evid. Code, §§ 770, 1235), she was still available; when she had been excused the previous day, she had been made subject to recall.

closing arguments had not yet been delivered. The prosecutor was more or less implicitly conceding that the recordings were favorable, by disclosing them. The trial court reasonably could have found that the recordings, although too cumulative to warrant a mistrial, did warrant the less drastic remedy of reopening.

Defendant argues that, to the extent that his defense counsel forfeited or otherwise failed to preserve his *Brady* claim, he rendered ineffective assistance. Defense counsel, however, could have had sound strategic reasons for moving for a mistrial rather than moving to reopen. As we will discuss in more detail below, the evidence was essentially cumulative. Moreover, it offered some grist for the prosecution's mill — notably, Jamie's statement, "I'm not going to lie for you." Thus, defense counsel could reasonably conclude that obtaining leave to reopen would be a Pyrrhic victory. By contrast, prevailing on a motion for mistrial would give defendant a whole new trial. Accordingly, we cannot say that there could be no reasonable explanation for counsel's actions.

Finally — and separately and alternatively — based on our independent review, we conclude that defendant failed to show that the recordings were material in the *Brady* sense. Defense counsel argued essentially that the recordings showed that Jamie changed her story because she learned that defendant was cheating on her. However, as the trial court observed, Jamie had already amply admitted that on February 15, 2006, defendant finally admitted had been cheating on her with his fiancée, Julia; Jamie felt hurt, angry, and manipulated; and, as a result, she contacted the prosecutor and changed her story.

Defendant argues that the prosecutor's offer of proof was inadequate to convey the full probative force of the recordings. Defense counsel forfeited this argument, however, by failing to ask the trial court to listen to the recordings themselves. Based on both counsel's presentations, the trial court correctly concluded that the evidence was cumulative.

Defendant argues that, even if our review is limited to the prosecutor's offer of proof, Jamie's statement "I hope you spend the rest of your life in jail" was not cumulative, because it would have impeached her testimony at the time of trial that she still did not "want [defendant] to go to jail for all of this." Obviously, however, when she contacted the prosecutor and agreed to testify against defendant, she wanted him incarcerated. A month later, by the time of trial, she had grown more ambivalent. This would be consistent with the on-and-off attitude toward defendant — typical of a domestic violence victim — that her testimony already showed. In any event, this kind of collateral impeachment does not rise to the level of a *Brady* violation.

Finally, then, defendant argues that, by failing to ask the trial court to listen to the recordings, defense counsel rendered ineffective assistance. Having listened to the recordings ourselves, we do not agree.

Preliminarily, we must summarize the recordings.

In the first conversation, Jamie tells defendant about her encounter with the "guy" who was driving Julia's car and who said that he was Julia's boyfriend. She adds that the

guy also said that defendant was Julia's ex-boyfriend. She asked the guy to "[h]ave [Julia] call me right now." As a result, the guy and Julia "called me on three-way."

Jamie then asks defendant, "Why'd you lie to me?" Defendant says he will call her right back.

In the second conversation, Jamie accuses defendant of hanging up on her so he could call Julia. Defendant denies this but says, "[I]f I wanted to get in contact with her, I could get in contact with her . . . ." This dialogue ensues:

"[Jamie]: . . . [S]he said that you guys will <u>always</u> be together.

"[Defendant]: She didn't tell you that! [¶] . . . [¶]

"[Jamie]: . . . Julie. Juliana. Buddha bear. Pocahontas. Your one and only. Your future wife's baby momma [*sic*]. The one that always got your back. This is her exact words. And I asked her, I said, you know what, [defendant] tells me that you guys only went to dinner once. You know, she laughed in my face."

Defendant accuses Jamie of lying; he also points out that Julie evidently has a new boyfriend. But Jamie persists: "I said, [defendant] said you guys never slept together. She laughed at me. Why did you say [that you] never slept with her?" Defendant says:

"[Defendant]: . . . I ain't talked to Julie in over <u>two months</u>.

"[Jamie]: You been in jail for four.

"[Defendant]: Exactly.

"[Jamie]: So you've been talking to her in jail?

"[Defendant]: Want me to tell you who Julie is, and who Julie was?

"[Jamie]: Sure.

"[Defendant]: Okay, you want me to be honest with you?

"[Jamie]: Yeah.

"[Defendant]: I'm being completely honest with you. Julie was my fianc[é]e. Julie was my love. She was my heart, she was. I'm not gonna lie to you. Me and Julie were supposed to be getting married August 19th of this year. We were on our way to move to Phoenix before all of this happened . . . . [T]hat's why I know Julie didn't tell you that, because Julie told me to stay out of her life. I lost Julie behind all of this."

Jamie then interrupts defendant to say that she is calling the prosecutor and hangs up.

In the third conversation, Jamie begins by saying, "I've been played like a sucker." She can then be heard leaving (or at least purporting to leave) a voice mail message for the prosecutor on another line.

Defendant accuses Jamie of being irrational and unable to accept the truth. When she asks, "So, after knowing somebody for that short a period of time, you were gonna get married that fast?," defendant answers, "I would have been married <u>now</u> if it wasn't for me and my dad and her brother. . . . We went down to the courthouse, filled out the paperwork and everything. She wanted to be married that fast."

Defendant insists, " . . . I do love you. I love you with all my heart. . . . I'd love to be with you, but you — you don't think rationally." Jamie asks defendant if he came back to her "[t]o make [his] case better[.]" He denies this.

Defendant admits, "I've known Julie before I moved out of [our] house. Julie was coming by the house." Jamie points out that defendant evidently wanted to marry Julie despite knowing her less than a year. She says: "I feel like such a fool." She adds:

"[Jamie]: I'm not gonna lie for you no more.

"[Defendant]: . . . [Y]ou're not lying for me about anything. I'm just saying, . . . me and Julie were done, and you made it seem like I didn't — did — didn't care for you. I don't —

"[Jamie]: You said you just tried to get in touch with her two month [*sic*] ago. Two months ago. That means you had me going up there seeing you and she was, too?

"[Defendant]: No. Why do you think me and Julie are [*sic*] together? . . . [W]hy do you think I'm not sitting here trying to get in contact with her? Why do you think?

"[Jamie]: Well, two months ago, you were still writing her two months ago — spending my money to write her?

"[Defendant]: . . . [W]hy do you think that . . . me and Julie aren't talking no more?

"[Jamie]: Excuse me, but you were still writing and talking to her. That was using my money to write her letters.

"[Defendant]: I haven't talked to Julie since November. November.

"[Jamie]: Yeah, and I was putting money on your books since you've been in there.

"[Defendant]: And . . . I don't understand . . . why do you lie and say she's telling you all this stuff and she wasn't.

"[Jamie]: What do you mean she wasn't? She was laughing in my face the whole damn time."

Jamie remarks, "I guess everybody that gets to fuck her gets to drive her raggedy-ass car, huh?" Defendant responds, "You're saying it's a raggedy-ass car but she has . . . an Impala that looks better than your Honda."

When defendant says Jamie is "talking about everybody,", she responds:

"[Jamie]: The way that I've been treated, I don't, I don't have that right, the way that I've been treated?

"[Defendant]: No! No, you don't. No, you don't, 'cause you don't even know her. She ain't had nothing to do with you. She, she —

"[Jamie]: Oh, she talked about that mess about me, though?

"[Defendant]: She talked about what mess about you?

"[Jamie]: Oh, I'm fat, . . . and I'm ugly."

Jamie then says that, according to Julia:

"[Jamie]: You was, like, I never loved [Jamie]. . . . You was, like, I've been together with her for years, she never met my daughter before. You was, like, I never wanted to marry her. [¶] . . . [¶]

"[Defendant]: Why do you lie? Why do you lie?

"[Jamie]: You know what, you spend the rest of your goddamn life in jail.

"[Defendant]: Why do you lie?

"[Jamie]: [hangs up.]"

No doubt the recordings themselves are more colorful and vivid than the prosecutor's summary of them. However, the prosecutor did accurately summarize their pertinent aspects. Moreover, the trial court's reasoning still applied: The jury already knew that Jamie called the prosecutor and changed her story because she was hurt and angry after defendant finally admitted cheating on her.[6] The rest is soap opera. Hence, defense counsel's failure to insist that the trial court listen to the recordings themselves was not objectively unreasonable. Moreover, defendant cannot show that, if defense counsel had insisted that the trial court listen to the recordings, the result would have been any more favorable to him. It follows that he has not shown ineffective assistance of counsel.

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[6] In his reply briefs, defendant attempts to draw a distinction between three potential triggers for Jamie's decision to go to the prosecutor: (1) Jamie learning that defendant had cheated on her; (2) defendant admitting that he had cheated on her; and (3) defendant indicating that he loved Julia more than her and otherwise treating Jamie in a cavalier manner. Defendant notes that Jamie already knew, from her encounter with Julia, that he was cheating on her. He further notes that he admitted cheating early on in the phone conversations. He concludes that the *real* trigger was the cavalier treatment, and that the phone conversations were material because they were necessary to show this.

Frankly, this strikes us as a distinction without a difference. Yes, perhaps if defendant had been more apologetic — if he had insisted that he loved Jamie more than Julia — Jamie might have reconciled with him yet again, rather than going to the prosecutor. Nevertheless, it is basically true to say that Jamie went to the prosecutor because she learned that defendant was cheating on her. Most important, we do not believe this is a distinction that would have made a difference to the jury.

Finally, defendant argues that the recordings tended to further impeach Jamie by contradicting her trial testimony in two respects. First, at trial, she testified:

"Q . . . What did the man in the car say that made you believe the car belongs to [defendant]'s new girlfriend? [¶] . . . [¶]

"A He said, 'This is my girlfriend Julia's car.'

"Q And were you angry?

"A I said, 'Okay. Thank you.'

"Q Did you have any other interaction with him?

"A No."

Defendant argues that this testimony was inconsistent with the recordings, in which Jamie stated that the man in the car went on to set up a three-way call between her and Julia.

Second, at trial, Jamie testified that, in the conversation on February 15, 2006, " . . . I said that I'm telling the DA. I'm gong to go along with the DA and stick to my first story. [Defendant] was, like, well, you told them anyway because you've already — you know, was at the prelim. You said what you had to say at the prelim. Now, you flip off[,] on . . . nobody is going to believe you anyway."

Defendant argues that this testimony was inconsistent with the recordings, because in the recordings, defendant never says that if Jamie changes her story, nobody is going to believe her.

Defense counsel forfeited this contention by failing to point out these discrepancies in the trial court. In any event, as we stated earlier, this kind of collateral impeachment does not rise to the level of a *Brady* violation. Accordingly, defense counsel's failure was not objectively unreasonable, and defendant has not shown that, if defense counsel had raise this issue, the outcome would have been any more favorable to him.

We therefore conclude that the trial court did not err by denying defendant's motion for a mistrial. Moreover, defense counsel's failures (1) to move to reopen, (2) to ask the trial court to listen to the recordings, and (3) to point out the specified discrepancies between Jamie's trial testimony and the recordings, did not constitute ineffective assistance.

IV

THE SUFFICIENCY OF THE EVIDENCE THAT DEFENDANT'S PRIOR FEDERAL CONVICTION FOR ATTEMPTED BANK ROBBERY CONSTITUTED A STRIKE

Defendant contends that there was insufficient evidence that his 2001 federal conviction for attempted bank robbery constituted a strike. The People concede the point; they ask only that we do not preclude them from retrying the strike prior allegation.

A. *Additional Factual and Procedural Background.*

The information alleged that defendant had one strike prior — a conviction for attempted bank robbery in violation of Title 18 United States Code section 2113, subdivision (a). Defendant waived a jury trial on this allegation.

In support of the allegation, the prosecution presented documentary evidence that in 2000 defendant had pleaded guilty in federal court to "Attempted Bank Robbery in violation of 18 U.S.C. § 2113(a) . . . ." The underlying offense had been committed in 1999. The trial court found the strike prior allegation true.

B. *Analysis.*

Title 18 United States Code section 2113(a) can be violated in two alternative ways. One requires the taking of bank property by force, violence, or intimidation. (18 U.S.C. § 2113(a), 1st par.) This corresponds, by and large, to bank robbery, which is a strike. (Pen. Code, §§ 667, subd. (d)(1), (2), 1170.12, subds. (b)(1), (2), 1192.7, subds. (c)(19), (39), (d); *People v. Miles* (2008) 43 Cal.4th 1074, 1081-1082.) The other way requires entering a bank with the intent to commit a felony therein. (18 U.S.C. § 2113(a), 2d par.) This essentially corresponds to commercial burglary, which is *not* a strike. (*People v. Miles*, *supra*, 43 Cal.4th at pp. 1082 & fn. 6, 1085-1087; see Pen. Code, §§ 667.5, subd. (c)(21), 1192.7, subd. (c)(18).)[7]

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[7] Bank robbery — whether completed or attempted — has been a serious felony, as defined in Penal Code section 1192.7, since at least 1989. (Stats. 1988, ch. 432, § 2, p. 1815.) Accordingly, we need not decide whether the relevant version of

[footnote continued on next page]

"Thus, evidence that the defendant suffered a previous conviction under [Title 18 United States Code] section 2113(a), standing alone, cannot establish that the conviction was for a serious felony under California law." (*People v. Miles*, *supra*, 43 Cal.4th at p. 1082.) There must be, in addition, evidence in the record of the prior conviction that the conviction involved a robbery rather than a burglary. (*Id*. at pp. 1082-1083)

Although here the record of the prior conviction recited that defendant was convicted for "[b]ank [*r*]*obbery*" (italics added), the People concede that this is insufficient evidence that he was convicted on a robbery theory rather than a burglary theory. (See *People v. Miles*, *supra*, 43 Cal.4th at pp. 1087-1088, 1091; but see *id*. at pp. 1084-1085.) Hence, they further concede that there was insufficient evidence to support the finding that this prior constituted a strike.

The People assert that, on remand, they should be allowed to retry the strike prior allegation and to present additional evidence that the prior did, in fact, constitute a strike. Defendant responds that such a retrial is barred by double jeopardy. Alternatively, he argues that, even assuming retrial is not barred, the prosecution will be barred from presenting any new or different evidence. We need not decide these questions; unless and until the prosecutor actually seeks to retry the strike prior allegation on remand, they are

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[footnote continued from previous page]
Penal Code section 1192.7 is the one that was in effect in 1993, 2000, or 2006. (See Pen. Code, §§ 667, subd. (h), 667.1, 1170.125.)

premature. (*People v. Zermeno* (1999) 21 Cal.4th 927, 933-934, fn. 3; *People v. Swain* (1996) 12 Cal.4th 593, 610.)

V

DEFENDANT'S REPRESENTATION BY COUNSEL

AND PERSONAL PRESENCE AT SENTENCING

Defendant contends that, at sentencing, the trial court erred by refusing to relieve his retained counsel and provide appointed counsel. Defendant also contends that the trial court erred by having him removed from the courtroom.

A. *Additional Factual and Procedural Background.*

1. *The initial sentencing hearing.*

At trial, defendant was represented by retained counsel. Prior to sentencing, defense counsel filed an arguably inadequate two-page motion for new trial.

On the date then set for sentencing, defense counsel stated:

"[DEFENSE COUNSEL]: [Defendant] wants to fire me and have the Public Defender appointed.

"THE COURT: There is no such thing. He doesn't qualify for the Public Defender.

"[DEFENSE COUNSEL]: I think he might, actually.

"THE COURT: Well, actually —

"[DEFENSE COUNSEL]: Here's the situation.

"THE COURT: No. If he fires you, he fires you. I'm making no promises about anything. I had forgotten that you're a retained lawyer. So . . . Marsden is not an issue."

The trial court ruled: "If [defendant] wants to fire [defense counsel], he can do so; that's between them. But I make no promises whether I would appoint a lawyer."

Defense counsel then requested a continuance for defendant "to retain additional counsel or have the Public Defender appointed to pursue a motion for new trial . . . ." The trial court granted a continuance.

The trial court indicated that it was denying the motion for new trial but that it would allow any new counsel to bring another new trial motion: "No one is going to find any grounds for a new trial, other than what [defense counsel]'s already found. And I've already denied those. So I'm going to give you that opportunity though. But [defense counsel] is not relieved at this time."

2. *The continued sentencing hearing.*

At the continued hearing, defense counsel indicated that defendant wanted to represent himself for the purpose of presenting a motion for new trial. The trial court responded: "[T]he motion has already been taken care of. And we're not going to reopen it." Defendant then said that he wanted to represent himself in any event for purposes of sentencing. The trial court allowed him to do so.

Defendant promptly repeated that he wanted to present a motion for new trial. The trial court responded, "It's denied. If you want to be heard on sentencing, that is all it's

going to be." Defendant declined to address sentencing. However, he also objected to having his counsel address sentencing, stating, "He's not my lawyer."

When the trial court said that it was going to proceed with sentencing, defendant responded:

"THE DEFENDANT: Well, I refuse to be sentenced today. I refuse.

"THE COURT: You don't have any right to refuse sentencing.

"THE DEFENDANT: Get off. I have a right to be heard. Send me out of here. Send me out of here. He's denying my rights. Send me out of here. He's denying my rights. I'm not going to be quiet. I'm facing 48 years. Charge me with contempt. Send me out of here. No, he's denying me my rights. No, he's denying me my rights. Send me out of here." The trial court called a recess instead.

After the recess, there was this exchange:

"[THE COURT:] [¶] . . . [¶]Is there any legal cause why you shouldn't be sentenced now, sir?

"THE DEFENDANT: Yeah, I don't understand.

"THE COURT: You know, you don't have to.

"THE DEFENDANT: I don't understand anything. You're violating my rights.

"THE COURT: What?

"THE DEFENDANT: Your Honor, you're violating my rights. I'm not understanding. I have the right to a fair and impartial trial at all stages of the trial. You're violating them.

"THE COURT: I'm going to tell you right now — I'm going to tell you right now, you keep talking and I'm going to sentence you without you being present.

"THE DEFENDANT: You can't do that.

"THE COURT: Do you want to watch me?

"THE DEFENDANT: Yeah, go ahead. Then send me back then because I'm not going to stand here and let you violate my rights. We're just going to complain to the commission.

"THE COURT: Do you understand me?

"THE DEFENDANT: You're violating my rights. I'm innocent. Take me out.

"THE COURT: Take him out.

"THE DEFENDANT: Take me out.

"THE COURT: For the record, the defendant is being obstreperous and disrupting. And I'm going to sentence him in his absence. I'm going to let somebody deal with that later on."

The trial court proceeded to sentence defendant in absentia. Defendant's original counsel represented him during the sentencing.

B. *Defendant's Request to Discharge His Retained Counsel and for the Appointment of New Counsel.*

An indigent defendant has the right to appointed counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 9 L.Ed.2d 799].) However, "an indigent defendant does not have the right to insist upon the appointment of a particular attorney."

(*Taylor v. Superior Court* (1985) 168 Cal.App.3d 1217, 1220.) Accordingly, an indigent defendant seeking to replace appointed counsel with different appointed counsel must "demonstrate either that the first appointed attorney is providing inadequate representation [citations], or that he and the attorney are embroiled in irreconcilable conflict [citations] . . . ." (*People v. Ortiz* (1990) 51 Cal.3d 975, 984.)

By contrast, a nonindigent defendant has no right to appointed counsel. (*Still v. Justice Court* (1971) 19 Cal.App.3d 815, 818.) However, a nonindigent defendant does have "[t]he right . . . to discharge his retained attorney, with or without cause . . . ." (*People v. Ortiz, supra,* 51 Cal.3d at p. 983, fn. omitted.) Thus — subject to concerns about the timeliness of the request and about possible prejudice to the defendant — a nonindigent defendant has the right to replace one retained attorney with another, for any reason. (*Id*. at pp. 983-984.)

Moreover, even an indigent defendant has the right to be represented by private counsel, if private counsel is willing to act without payment. (*U.S. v. Gonzalez-Lopez* (2006) ___ U.S. ___, ___ [126 S.Ct. 2557, 2561, 165 L.Ed.2d 409].) If an indigent defendant has private counsel, then just like a nonindigent defendant, he or she also has the right to discharge that counsel, with or without cause. (*People v. Ortiz, supra*, 51 Cal.3d at p. 987.) Once such counsel has been discharged, the indigent defendant is entitled to new appointed counsel. However, in ruling on the motion to discharge retained counsel, "a court must not consider whether a defendant is indigent and will require appointment of counsel . . . ." (*Ibid*.)

Finally, both an indigent and a nonindigent defendant have the right of self-representation — i.e., the right to discharge their counsel, regardless of whether appointed or retained, and to proceed in propria persona. (*Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].)

Here, the trial court quite properly tried to keep defendant's motion to discharge his retained counsel separate and apart from his request for appointed counsel. It stated, "If [defendant] wants to fire [defense counsel], *he can do so*; that's between them." (Italics added.) It also stated, "If he fires you, he fires you." Thus, at that point, defendant was free to discharge his retained counsel.

Also, while the trial court had not agreed to appoint new counsel, it had not refused to do so, either. True, at first, it had said, "He doesn't qualify for the Public Defender." This was a reasonable observation, given that, at the point, defendant had retained counsel. Defense counsel responded that defendant "might" qualify. This fell short of a representation to the court that defendant in fact was indigent and did qualify. Moreover, defendant did not offer any evidence of indigence. The trial court therefore was speaking no more than the literal truth when it said that it could not promise that it would appoint new counsel.

Apparently, defendant was reluctant to discharge his retained counsel until *after* he had *already* arranged for new counsel. Thus, even though the trial court had indicated that he *could* discharge his retained counsel, he did not do so. His retained counsel, on his behalf, requested a continuance so defendant could *either* "retain additional counsel or

have the Public Defender appointed . . . ."[8] The trial court granted the requested continuance. When the time elapsed, however, defendant had not retained new counsel, nor did he renew his request for appointed counsel. Instead, he asked to represent himself. The trial court granted the request.

In sum, then, we cannot see that the trial court ever actually refused to let defendant discharge his retained counsel. Quite the contrary — it expressly stated that defendant was free to do so. We likewise cannot see that the trial court ever actually refused to appoint counsel for defendant. Defense counsel essentially withdrew the request by asking for a continuance instead.[9] At worst, the trial court simply refused to rule on defendant's request for appointed counsel unless and until defendant did, in fact, discharge his retained counsel (and show indigence). This was not error.

C. *The Removal of Defendant from the Courtroom*.

Defendant argues that his removal from the courtroom violated his right to be present at sentencing as well as his right of self-representation.

"A criminal defendant's right to be personally present at trial is guaranteed under the federal Constitution by the confrontation clause of the Sixth Amendment and the due

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[8] Evidently, defendant believed that he might still be able to find different retained counsel. This supports our view that he never made an unequivocal claim that he was, in fact, indigent.

[9] We do get the sense that the trial court and defense counsel were talking past each other. Nevertheless, it was defense counsel's duty to secure a clear, final ruling from the trial court. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1017, fn. 20.)

process clause of the Fourteenth Amendment. It is also required by section 15 of article I of the California Constitution and by sections 977 and 1043. [Citations.]" (*People v. Concepcion* (2008) 45 Cal.4th 77, 81.) "A defendant's right to presence, however, is not absolute." (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) For one thing, a defendant may be voluntarily absent from trial. (Pen. Code, § 1043, subd. (b)(2); *Gutierrez*, at pp. 1199, 1203.) A defendant may also forfeit the right to be present by being disruptive. (Pen. Code, § 1043, subd. (b)(1); *People v. Welch* (1999) 20 Cal.4th 701, 774.)

Here, the trial court could reasonably find that defendant had voluntarily absented himself from trial. (See *People v. Concepcion*, *supra*, 45 Cal.4th at p. 84 [appellate court reviews trial court's finding that defendant was voluntarily absent for substantial evidence].) Defendant repeatedly stated, "Send me out of here. Send me out of here." The trial court ordered a recess so he could calm down, but when the hearing resumed, defendant repeated, "[S]end me back" and "Take me out."[10]

In this respect, this case is closely analogous to *People v. Lewis* (1983) 144 Cal.App.3d 267. There, the defendant announced, "I'm not even going to participate in the trial." (*Id*. at p. 270, fn. 1.) When the trial court stated, "[I]f you will not participate

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[10] Defendant does not contend that his waiver of his right to be present had to be in writing (see Pen. Code, § 977, subd. (b)); thus, he has forfeited any such contention. In any event, a written waiver was not required. (*People v. Howard* (1996) 47 Cal.App.4th 1526, 1538-1539 [Fourth Dist., Div. Two], disapproved on other grounds in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

and if you want to be disruptive in the courtroom, I will tell you at this time that we will take you and we will put you in the lockup," the defendant responded, "Put me in the lockup." (*Id*. at pp. 270-271, fn. 2.) The appellate court held "that by words and conduct appellant waived his right to be present voluntarily . . . ." (*Id*. at p. 279.)

Defendant argues that his request to be absent was "not truly voluntary," because the trial court "goaded" him into making this request. Not so. The trial court made a legal ruling — refusing to let defendant present a second motion for new trial — that defendant disagreed with. Defendant had the fully voluntary choice to accept the ruling like a grown-up (perhaps while silently promising himself to appeal it later)[11] or to throw a tantrum. He made a wrong but voluntary choice.

He complains about the trial court's rhetorical question, "Do you want to watch me?," describing it as "fail[ure] to exhibit an appropriate judicial temperament . . . ." However, "a trial court has the duty to control the trial proceedings. [Citation.] When an attorney engages in improper behavior, such as ignoring the court's instructions or asking inappropriate questions, it is within a trial court's discretion to reprimand the attorney, even harshly, as the circumstances require. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) This is all the more true of a self-represented criminal defendant.

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[11] Defendant argues that the trial court erred by ruling that he could not bring a second new trial motion. His only point, however, appears to be that he was not being genuinely disruptive. He does not appear to be asserting this as a separate and distinct ground for reversal. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [brief must state each point under a separate heading or subheading].) We deem him to have forfeited any such contention.

The trial court's remark was well within the bounds of propriety. In any case, defendant's tantrum was already well under way, and he had already said, "Send me out of here" before the trial court supposedly "goaded" him by making this remark.

Citing the trial court's finding that he was "being obstreperous and disrupting," defendant argues that the trial court did *not* find that he was absent voluntarily. The two findings, however, are not mutually exclusive. The trial court could properly find that — much like the defendant in *Lewis* — defendant was asking to be voluntarily absent, while at the same time threatening to disrupt the proceedings if the trial court did not grant his request.

Thus, in any event, separately and alternatively, the trial court could properly exclude defendant because he was being disruptive. "[A] defendant may waive his right to be present at his trial by being disruptive at the trial, and appellate courts must give considerable deference to the trial court's judgment as to when disruption has occurred or may reasonably be anticipated. [Citations.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 773.) Here, defendant refused to be sentenced, then launched into a tirade. As a result, the trial court called a recess. When it resumed, even though defendant had had time to calm down, he promptly launched into a similar tirade.

Defendant argues that he was not sufficiently disruptive to warrant his removal. He compares this case to others in which the defendant was removed for being far more abusive or even violent. (E.g., *Illinois v. Allen* (1970) 397 U.S. 337, 339-340 [90 S.Ct. 1057, 25 L.Ed.2d 353].) Such cases, however, are not authority for the proposition that a

lesser level of disruption would not suffice. Under the applicable standard of review, which is deferential, defendant's conduct was amply disruptive.

Defendant also argues that the trial court could not remove him without a prior warning. (See Pen. Code, § 1043, subd. (b)(1).) The trial court, however, did warn him. It said, " . . . I'm going to tell you right now, you keep talking and I'm going to sentence you without you being present." Indeed, elsewhere, defendant appears to admit this; in claiming that the trial court goaded him into asking to be absent, he says it "threaten[ed] to have him removed . . . ."

To the extent that defendant's claim is based on his right to self-representation rather than his right to be present, it fares no better. As we have already held, defendant voluntarily absented himself. "[T]he right of a defendant to represent himself includes the right to decline to conduct any defense whatsoever. 'The choice of self-representation preserves for the defendant the option of conducting his defense by nonparticipation. [Citation.] . . .' [Citation.]" (*People v. Parento* (1991) 235 Cal.App.3d 1378, 1381.) "It follows that a defendant who has exercised his right of self-representation by absenting himself from the proceedings, may not later claim error resulting from that exercise." (*Id.* at pp. 1381-1382.)

Moreover, much like the right to be present, the right of self-representation can be forfeited by disruptive behavior. (*People v. Welch*, *supra*, 20 Cal.4th at p. 734.) "The trial court possesses much discretion when it comes to terminating a defendant's right to

self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' [Citations.]" (*Id*. at p. 735.)

We therefore conclude that the trial court did not err by having defendant removed from the courtroom or by reappointing his former defense counsel to represent him at sentencing.

VI

FINDING ON THE ONE-YEAR PRIOR PRISON TERM ALLEGATION

Defendant contends that the trial court failed to make any finding on the prior prison term enhancement allegation (Pen. Code, § 667.5, subd. (b)), and therefore the one-year term imposed on this allegation must be stricken.

A. *Additional Factual and Procedural Background.*

Under the heading "PRIOR OFFENSE," the information alleged that defendant's prior conviction for attempted bank robbery constituted a one-year prior prison term enhancement. It then further alleged, under the heading "SPECIAL PRIOR OFFENSE [PC 667(c)&(e)(1) and 1170.12(c)(1)]," that the identical prior conviction constituted a strike. (Bold face and underlining of headings omitted.)

At the hearing on the priors, the trial court stated: " . . . I would find that the prior offense and special prior offense pursuant to 667(c) and (e) are, in fact, true."

At sentencing, the trial court imposed a one-year term for the prior prison term enhancement.

B. *Analysis*.

The trial court *did* make a finding that the prior prison term enhancement allegation was true. In fact, we are at a loss to understand why defendant argues otherwise.

In his brief, defendant uses underscoring to highlight the requirement that the defendant must have served a separate prior prison term for the prior conviction. Perhaps, then, he is trying to argue that the trial court failed to make a specific finding that he had served a separate prior prison term. Even if so, we disagree. Under the heading, "PRIOR OFFENSE," the information had alleged all of the elements of the enhancement, including that defendant had "served a separate term in prison for said offense . . . ." By finding "the prior offense . . . true," the trial court adequately indicated that it was finding the entire enhancement allegation true.

VII

FAILURE TO STATE REASONS

FOR FULL CONSECUTIVE SENTENCING

Defendant contends that the trial court erred by failing to state reasons for imposing full consecutive sentences on count 1 (rape) and count 2 (forcible oral copulation). He further contends that, if his defense counsel forfeited this issue by failing to raise it below, that failure constituted ineffective assistance.

Defendant must be resentenced in any event. (See part IV, *ante*, parts VIII, IX, *post*.) Because there is no reason to suppose that the asserted error will recur on remand, we do not reach this contention.

VIII

THE APPLICATION OF PENAL CODE SECTION 654

Defendant contends that, once the trial court had sentenced him on count 1 (forcible rape), count 2 (forcible oral copulation), and count 3 (robbery), the imposition of separate and unstayed sentences on count 4 (spousal abuse) and count 5 (false imprisonment) constituted multiple punishment in violation of Penal Code section 654. The People concede the error. Rather than independently analyze the issue, we accept the People's concession.

IX

DUAL USE OF DEFENDANT'S PRIOR CONVICTION

Defendant contends that the trial court made a prohibited dual use of his prior conviction as both an aggravating factor and as the basis of the prior prison term enhancement. (See Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(c).) The People concede the error. Once again, rather than analyze the issue independently, we accept the People's concession.

X

CUNNINGHAM ISSUES

Defendant contends that the trial court erred by imposing upper term sentences and consecutive sentences based on factual findings not made by a jury and not made beyond a reasonable doubt. Although defendant must be resentenced in any event (see parts IV, VIII, IX, *ante*), we address this contention for the guidance of the trial court on remand.

A. *Upper Terms.*

"Other than a prior conviction, [citation] . . . 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citations.]" (*Cunningham v. California* (2007) ___ U.S. ___, ___ [127 S.Ct. 856, 864, 166 L.Ed.2d 856].) "'[T]he relevant "statutory maximum"' . . . 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.' [Citation.]" (*Id*. at p. 860.) Thus, under the determinate sentencing law (DSL), as it stood when defendant was sentenced, ordinarily, "the middle term . . . , not the upper term, [wa]s the relevant statutory maximum. [Citation.]" (*Id*. at p. 868.)

However, "if one aggravating circumstance has been established in accordance with the[se] constitutional requirements . . . , the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*People v. Black* (2007) 41 Cal.4th 799, 813, fn. omitted.) "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth

Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances . . . , regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Ibid*.)[12]

As mentioned earlier, under the prior conviction exception, there is no right to a jury trial or to proof beyond a reasonable doubt regarding the fact of a prior conviction. Here, defendant had served a prior prison term. This is well-recognized aggravating factor. (Cal. Rules of Court, rule 4.421(b)(3).) Moreover, this factor is within the scope of the prior conviction exception. (*People v. Towne* (2008) 44 Cal.4th 63, 79.) Thus, defendant was eligible for the upper term, and the trial court could constitutionally find other aggravating factors, including that the crimes involved great violence.

Defendant argues that, because the trial court imposed a prior prison term enhancement, it was prohibited from using the prior prison term as an aggravating factor. (See part IX, *ante*.) However, the trial court had the option of striking the enhancement (*People v. Bradley* (1998) 64 Cal.App.4th 386, 392-396); if it did so, it would be free to use the prior prison term as an aggravating factor. (Cal. Rules of Court, rule 4.420(c).) Accordingly, we still conclude that the prior prison term made defendant *eligible* for the upper term.

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[12] Defendant argues that this so-called "single aggravating factor rule" violates the Sixth Amendment. We are bound, however, to follow our Supreme Court's interpretation of the Sixth Amendment in *People v. Black*, *supra*, 41 Cal.4th 799, which announced the single-factor rule.

While this appeal was pending, the Legislature amended the DSL so that the midterm is no longer the relevant statutory maximum. (Stats. 2007, ch. 3.) Thus, under these amendments, a trial court can always impose an upper term sentence based on facts not found by a jury and not found beyond a reasonable doubt. In *People v. Sandoval* (2007) 41 Cal.4th 825, the Supreme Court declined to decide whether these amendments were intended to apply to crimes committed before they were enacted. (*Id*. at p. 845.) It held, however, that even if not, the DSL should be judicially reformed along the same lines as the amendments in order to render it constitutional. (*Id*. at pp. 844-852.)

Defendant argues that, on remand, the amended and/or reformed version of the DSL cannot constitutionally be applied to him. In *Sandoval* itself, however, the Supreme Court rejected an identical argument. (*People v. Sandoval*, *supra*, 41 Cal.4th at pp. 853-857.) We are bound to reject it here. In any event, as we have already held, defendant is eligible for the upper term; thus, even under the unamended, unreformed version of the DSL, the trial court could properly impose the upper term based on findings not made by a jury and not made beyond a reasonable doubt.

B. *Consecutive Terms*.

The Sixth Amendment does not require that consecutive terms be based on findings made by a jury or found beyond a reasonable doubt. (*Oregon v. Ice* (2009) ___ U.S. ___, ___ [129 S.Ct. 711, 716-719]; *People v. Black*, *supra*, 41 Cal.4th at pp. 820-823.) This is true regardless of whether the consecutive terms are imposed pursuant to

Penal Code section 669 (*Black*, at pp. 820-823) or, as here, Penal Code section 667.6 (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1232).

We therefore conclude that the trial court did not impose either upper terms or consecutive terms in a manner that violated the Sixth Amendment.

XI

DISPOSITION

The true finding on the strike prior allegation is reversed. The judgment with respect to the sentence is also reversed.

On remand, the trial court is directed that, if it imposes separate and unstayed sentences on counts 1, 2, and 3, it must stay the sentences on counts 4 and 5. (See part VIII, *ante*.)

The trial court is further directed that it may use the prior conviction as an aggravating factor or as the basis of a prior prison term enhancement, but not both. (See part IX, *ante*.)

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

GAUT
J.